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No. 02-954

IN THE SUPREME COURT OF THE UNITED STATES

OFFICE OF INDEPENDENT COUNSEL,
Petitioner,

v.

ALLAN J. FAVISH, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS SHEILA FOSTER ANTHONY AND LISA FOSTER MOODY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Exemption 7(C) of the Freedom of Information Act protects law enforcement information from public disclosure that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

The question presented is whether, under Exemption 7(C), the Office of Independent Counsel properly withheld photographs of the body of Vincent W. Foster, Jr., former Deputy White House Counsel, taken by the Park Police at the scene of his suicide.

PARTIES TO THE PROCEEDING

Respondent Allan J. Favish brought this suit against Petitioner Office of Independent Counsel. Respondents Sheila Foster Anthony and Lisa Foster Moody intervened as defendants in the district court.

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BRIEF FOR RESPONDENTS SHEILA FOSTER ANTHONY AND LISA FOSTER MOODY IN SUPPORT OF PETITIONER

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals on the first appeal (Pet. App. 4a-43a) are reported in *Favish v. Office of Indep. Counsel*, 217 F.3d 1168 (9th Cir. 2000). The order of the court of appeals and the dissenting opinion on the second appeal (Pet. App. 1a-3a) are unreported. The order of the court of appeals denying petitions for rehearing and suggestions for rehearing *en banc* and the dissent of Judge Pregerson (Pet. App. 63a-64a) are unreported. The opinions of the district court (Pet. App. 44a-46a, 47a-62a) are unreported.

JURISDICTION

The court of appeals entered its judgment on June 20, 2002. That court entered an order denying timely petitions for rehearing on August 16, 2002. This Court granted the petition for a writ of certiorari filed by the Office of Independent Counsel on May 5, 2003. Petitions for a writ of certiorari filed by respondents Sheila Foster Anthony and Lisa Foster Moody (No. 02-599) and by respondent Allan J. Favish (No. 02-409) are pending. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Freedom of Information Act ("FOIA") provides that:

> (b) This section does not apply to matters that are
>
> . . .

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information

. . .

(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy.

5 U.S.C. § 552(b)(7)(C).

STATEMENT

1. Vincent W. Foster, Jr., was Deputy White House Counsel under President Clinton. Mr. Foster was found dead in Fort Marcy Park, a national park in northern Virginia, on July 20, 1993. The National Park Service investigated his death. Later inquiries were performed by separate committees of the Senate and House of Representatives. In addition, the Office of Independent Counsel (OIC), under Robert B. Fiske, Jr., and then Kenneth W. Starr conducted two separate investigations into his death. *See Favish*, 217 F.3d at 1179-80, Pet. App. 26a-29a (Pregerson, J. dissenting) (summarizing investigations). The Starr inquiry took over three years and involved "interviews with more than thirty witnesses and analysis of hundreds of documents, forensic reports, the physical evidence, and death-scene and autopsy photographs." *Id.* at 1180, Pet. App. 28a.[1] The Starr OIC consulted various nationally recognized forensic experts. Pet. App. 28a n.8. All these investigations independently concluded that Mr. Foster committed suicide by a self-inflicted gunshot wound.

[1] The full report of the second Independent Counsel (the "Starr Report") is printed, without attachments, at JA 97-211.

Plaintiff, a lawyer and conspiracy theorist, is unpersuaded. Rather, he asserts that the numerous professional investigators and public officials who have studied Mr. Foster's death are guilty of wrongful conduct. In 1997, Plaintiff made a FOIA request for copies of 150 photographs compiled during the investigations. Following litigation (and plaintiff's withdrawal of his request for 21 photographs), he now possesses copies of 118 photographs identified in his original request. *Id.* at 1170-71, Pet. App. 6a. Also, he has been granted access to an abundance of other investigative materials that provide great detail about Mr. Foster's death and the subsequent investigations into it, including extensive information concerning the gunshot wound that caused Mr. Foster's death.[2] Plaintiff has published much of the information and materials he obtained, including 13 photographs relating to Mr. Foster's death – for example, a photograph of Mr. Foster's eyeglasses found at the death scene – on his web site http://www.allanfavish.com/photoix.htm (visited June 17, 2003).

The ten remaining photographs, taken shortly after Mr. Foster's body was discovered, depict his corpse lying in

[2] Much of this detail appears in the public Starr Report. JA 97-211. The results of the two congressional investigations, including two volumes of public hearings, also were made available to the public. *Hearings Relating to Madison County Guaranty S&L and the Whitewater Development Corporation—Washington, DC Phase*, S. Hrg. 103-889, Vols. 1 & 2 (1995); *Final Report of the Special Committee to Investigate Whitewater Development Corp. and Related Matters on the Investigation of Whitewater Development Corp. and Related Matters*, S. Rep. No. 104-280 (1996); *Report of the Committee on Banking, Housing, and Urban Affairs United States Senate on the Inquiry into the U.S. Park Police Investigation of the Death of White House Deputy Counsel Vincent W. Foster, Jr.*, S. Rep. No. 103-433 (1996).

Fort Marcy Park.[3] Mr. Foster's widow and sister have intervened in this case because they believe that release of these photographs would constitute a severe and unwarranted invasion of their family's privacy. By invading their memory of a loved one, by subjecting them to harassment from any number of media outlets, and by leaving them vulnerable to the unwitting viewing of profoundly disturbing images, disclosure of these photographs clearly would implicate their family's privacy interests.

2. Plaintiff also participated as counsel in a FOIA suit in the District of Columbia brought by an organization seeking photographs of Mr. Foster's body at the death scene and the autopsy, including the same photographs at issue here. *Accuracy in Media, Inc. v. Nat'l Park Serv.*, 194 F.3d 120 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1111 (2000).[4] The D.C. Circuit affirmed the district court's ruling that plaintiff, which had presented paltry evidence of government wrongdoing, had not shown a sufficient public interest in disclosure to outweigh the Foster family's privacy interest in the photographs. *Id.*

3. Plaintiff brought this action in the Central District of California against the Office of Independent Counsel, seeking numerous photographs relating to Mr. Foster's suicide. To support the OIC's defense, Respondents Anthony and Moody submitted Declarations attesting to the invasions of family privacy that release of the photographs would entail. Those Declarations also described the prior severe impact on the family of a black and white copy of a

[3] The district court's description and discussion of each photograph appears at Pet. App. 45a-46a.

[4] The D.C. Circuit case involved black and white copies of the photographs. The present case involves color Polaroid originals. *Favish*, 217 F.3d at 1177, Pet. App. 21a-22a.

death scene photograph depicting Mr. Foster's right hand holding the gun that took his life, which had been leaked to and published by the national media. The district court ordered disclosure of some photographs, but refused disclosure of the ten death scene photographs that showed Mr. Foster's body or face. The district court found that plaintiff had not "sufficiently explained how the disclosure of these photographs will illuminate any deficiencies of the OIC investigation." Pet. App. 59a. The court concluded that "[d]ue to this uncertainty and the extensive investigation of this affair that has already occurred, the Court finds that the privacy interests of the Foster family members outweigh the public interest in disclosure." Pet. App. 59a.

Plaintiff appealed, and the Ninth Circuit, although concluding that there is a survivor's right of privacy, reversed and remanded. The appellate court directed the district court to examine the photographs *in camera* in order to weigh the privacy interests of the Foster family against the claimed public interest in disclosure. *Favish*, 217 F.3d at 1174, Pet. App. 13a-14a. Judge Pregerson dissented in part. He found that the Vaughn index submitted by the OIC contained a sufficiently detailed description of the photographs to obviate the need for *in camera* review and that the Foster family's compelling privacy interest clearly outweighed any public interest in disclosure of the death scene photographs, except as to the photograph of Mr. Foster's right hand holding the gun, which Judge Pregerson would have released. *Id.* at 1186-87, Pet. App. 43a.[5]

Plaintiff had asserted that the ten photographs of Mr. Foster's face and body were needed to explain purported deficiencies and inconsistencies in the Starr Report

[5] The Vaughn index's description of the photographs appears at *Favish*, 217 F.3d at 1176-77, Pet. App. 20a.

concerning the nature and location of the entrance and exit wounds – deficiencies and inconsistencies that, plaintiff contended, supported his overall contention that the OIC's investigation was "grossly incomplete and untrustworthy." *Id.* at 1184, 1185-86, Pet. App. 38a-43a. Judge Pregerson in dissent rejected plaintiff's assertion, agreeing with the D.C. Circuit's conclusion that the claimed shortcomings were not sufficient to show wrongful agency conduct or to establish a public interest in disclosure that outweighed the Foster family's privacy interest. *Id.* at 1185-86, Pet. App. 40a-43a. (citing *Accuracy in Media*, 194 F.3d at 124). In concluding that *in camera* inspection was not needed, Judge Pregerson concurred with the D.C. Circuit's observation that "we cannot imagine any photos that could both elucidate the true nature of Foster's wounds and yet not be disturbingly graphic." *Id.* at 1177, Pet. App. 22a (quoting *Accuracy in Media*, 194 F.3d at 125).

In contrast, the Ninth Circuit majority stated that a FOIA requester is not required to have knowledge or evidence of agency wrongdoing. *Id.* at 1172, Pet. App. 10a-11a. The court did note that plaintiff had offered evidence and arguments that the OIC had engaged in misfeasance in its investigation of Foster's death, but concluded that "it is not the function of the court in a FOIA proceeding to weigh such evidence or adjudicate such arguments." *Id.* at 1173, Pet. App. 11a. The Ninth Circuit dismissed the relevance of the multiple investigations concluding that Mr. Foster's death was a suicide in Fort Marcy Park, stating:

> Nothing in the statutory command shields an agency from disclosing its records because other agencies have engaged in similar investigations . . . [I]t is a feature of famous cases that they generate controversy, suspicion, and the desire to second guess the authorities. The continuing discussion of the assassination of President Kennedy may suffice to make the point.

Id. at 1173, Pet. App. 11a.

Judge Pregerson disagreed, stating that, given the unanimous conclusion reached by multiple investigations and the fact that "[i]ntense media scrutiny . . . has also reached the same conclusion and has uncovered no wrongdoing, . . . the public's interest in further investigating Vincent Foster's death has significantly diminished." *Id.* at 1185, Pet. App. 39a.

The OIC had represented to the court of appeals that the withheld photographs are "graphic, explicit, and extremely upsetting." *Id.* at 1174, Pet. App. 13a-14a. The court, however, in remanding concluded that this description "is not true of the photo already published in *Time* and on television, showing a hand holding a gun," adding that: "It may be true of the remaining 9 photos. But no court has ever seen them." *Id.*

4. On remand, the district court interpreted the court of appeals decision as limiting the Foster family's privacy interest to items that are "graphic, explicit, and extremely upsetting." It concluded that five of the photographs fit this description and therefore were precluded from disclosure under FOIA Exemption 7(C). 5 U.S.C. § 552(b)(7)(C). However, it granted disclosure with respect to the remaining five photographs that it found did not meet this test. Pet. App. 44a-46a. But the district court made no finding as to how photographs that were not "graphic, explicit, and extremely upsetting" might nevertheless contain

sufficient detail to elucidate the true nature of Mr. Foster's wounds and thus advance the alleged public interest.

Sheila Foster Anthony and Lisa Foster Moody then intervened as defendants, submitting additional Declarations in support of their motion for reconsideration. JA 90-96.[6] When that motion was denied, they joined in the OIC's appeal. Plaintiff also appealed.

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[6] The Amended Declaration of Mr. Foster's widow stated:

> I did not even open Vince's casket for fear of seeing him distorted by the autopsy. I surely cannot bear seeing him lying on the ground in Fort Marcy Park with blood stains on him, coupled with the indignity of the whole world's viewing these pictures in tabloids or on the Internet. My understanding of the photographs is that all of them would be extremely upsetting to the family and cause us no end of pain and sorrow. The shock of seeing the picture of Vince on the television with the gun in his hand is still a horrifying memory for me. . . . JA 95.

The Amended Declaration of Mr. Foster's sister stated:

> Our family was horrified and devastated by the photograph leaked to the press and published on a national television network and in newspapers of Vince's dear dead hand holding the gun he used to kill himself. That photograph has been shown in national media again and again and every time I see it I have nightmares and heart-pounding insomnia as I visualize how he must have spent his last few minutes and seconds of his life. My mother has suffered unimaginable sorrow and depression in losing her only son, but her grief (and ours) has been compounded by the fear that she will see upsetting reports[ ] about him on her television set or see headlines and photographs in the tabloids on the grocery store racks where she shops. . . . JA 91-92.

Ms. Anthony and Ms. Foster, as well as the OIC, vigorously argued that the district court had erred badly in concluding that the Ninth Circuit has ruled that the photographs must be "graphic, explicit, and extremely upsetting" before the survivor's right of privacy attaches. However, after *in camera* review of the photographs, the Ninth Circuit, failing to deal with this argument, summarily affirmed the district court's judgment, except as to one of the photographs that the district court had ordered released, which the panel concluded should not be. Judge Pregerson dissented, reiterating his position that nine of the photographs implicate a privacy interest that outweighs any interest that the public possesses in their release. Pet. App. 2a-3a. The court, with Judge Pregerson again dissenting, declined to reconsider its decision *en banc*. Pet. App. 63a.

SUMMARY OF ARGUMENT

Respondent Favish's ghoulish attempt to obtain and publicize photographs of Vince Foster lying dead in Fort Marcy Park is not supported by any legitimate public interest and, if successful, would trample on fundamental privacy interests of Mr. Foster's survivors.

1. FOIA Exemption 7(C) authorizes agencies to withhold law enforcement information where public disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C § 552(b)(7)(C). Public disclosure may be "warranted" only if it would throw light on the operations of government. In this case, plaintiff asserts that public disclosure may show that the numerous investigations of Vincent Foster's death – all of which concluded that he committed suicide – ignored contrary evidence and were mishandled. But the D.C. Circuit, in a case involving the same photographs at issue here, correctly concluded that plaintiff's evidence of official

wrongdoing was not compelling or persuasive and thus should not be allowed to override the invasion of the Foster family's privacy that publication of photographs of Mr. Foster's body would entail.

The D.C. Circuit was right. Given the numerous investigations of the Foster death, the unanimous conclusion that he committed suicide, and the voluminous material already made public, it may "reasonably be expected" that publication of these photographs will add nothing further to public understanding of the workings of government and will accomplish nothing but further intrusion on the Foster family's privacy. The D.C. Circuit correctly required compelling, or at least persuasive, evidence that public release of these photographs would further the public interest by showing official wrongdoing before concluding that such release was warranted. The Ninth Circuit's minimal standard for overriding privacy concerns would undermine the significant privacy protections Congress intended Exemption 7(C) to provide. The kinds of minor inconsistencies plaintiff alleges are typically present in any large, high-profile investigation. If they are enough to overcome privacy protection, persons like plaintiff will have free rein to rummage through law enforcement records and publish any material they obtain, no matter how damaging that may be to privacy rights.

The Ninth Circuit also erred by failing to recognize that the numerous investigations of Foster's death, all of which found that he shot himself, bolstered the conclusion that publication of the photographs was not warranted because they could not reasonably be expected to support a finding that there was official falsification. And the Ninth Circuit's error was compounded by its failure to find any plausible nexus between the photographs and the public interest asserted as a justification for their public release.

2. Unanimous case law under FOIA establishes that there is a survivors' privacy interest and that public disclosure of autopsy and other photographs of a corpse violates the privacy of the surviving family. The decision rejecting a request for FOIA disclosure of the autopsy photographs of President Kennedy is just one example of the firm stance courts have taken against such appalling requests. *Katz v. Nat'l Archives & Records Admin*, 862 F.Supp. 476 (D.D.C. 1994), *aff'd on other grounds*, 68 F.3d 1438 (D.C. Cir. 1995).

This Court should follow this authority. Publication of photographs of a family member's body is a highly offensive intrusion into the family's privacy. It is the modern equivalent of putting the body itself on public display – an act that since ancient times has been regarded as a highly offensive intrusion on family rights. The harm exists whether or not the photographs display gruesome details. Both law and long-standing tradition establish that a deceased's family has the right to deal with the body according to the family's customs and beliefs, and to take final leave of their loved one in a private manner, if they so choose. Public release of these photographs would intrude on that right and cause the Foster family extreme grief, anguish and mortification.

ARGUMENT

PLAINTIFF DID NOT MAKE A SHOWING OF PUBLIC INTEREST SUFFICIENT TO OVERCOME THE FOSTER FAMILY'S SIGNIFICANT PRIVACY INTEREST IN PHOTOGRAPHS OF MR. FOSTER'S BODY.

FOIA Exemption 7(C) protects from public disclosure law enforcement records or information the production of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). To determine whether an invasion of privacy could reasonably be expected to be "unwarranted," "a court must balance the public interest in disclosure against the interest Congress intended the Exemption to protect." *United States Dept. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 776 (1989).

The court of appeals erred in this case on both sides of the balance, by i) concluding that Favish had demonstrated a public interest in disclosure with respect to the photographs the court ordered released, and by ii) concluding that the invasion of privacy occasioned by release of these photographs did not outweigh the purported public interest served. The result is a decision that allows a shocking intrusion into the Foster family's privacy that is not justified by any public interest in understanding the workings of government. The court of appeals conclusion is all the more disturbing because it confirmed the district court's palpably misguided opinion without undertaking to write an opinion that explained its problematic conclusions. We thus are left with an unprincipled decision that may well render government agencies investigating incidents of violent death unable to prevent gross intrusions on the privacy of surviving family members.

A. Plaintiff's Allegations Are Insufficient To Demonstrate A Public Interest In Disclosure Of Photographs That Would Invade The Foster Family's Privacy.

Under FOIA, public disclosure that could reasonably be expected to invade privacy rights is "warranted" only if it would "contribute[] significantly to public understanding *of the operation or activities of the government*." *Reporters Committee*, 489 U.S. at 775 (emphasis in original). In the courts below, plaintiff contended that public disclosure of the photographs of Mr. Foster's body would meet this standard, because the photographs might show that the various investigations of Mr. Foster's death – all of which concluded that he committed suicide – were mishandled and untrustworthy.

The D.C. Circuit properly concluded that public disclosure of the same photographs would not meet that standard, because the various inconsistencies alleged in the evidence concerning Mr. Foster's death – the same inconsistencies Favish alleges here – were not "persuasive evidence . . . much less compelling evidence" of falsification in the Starr Report or in the other investigations also concluding that Mr. Foster committed suicide. *Accuracy in Media,* 194 F.3d 120, 124 (D.C. Cir. 1999).

The Ninth Circuit's opposite conclusion stemmed from three errors: 1) its use of an overly lax standard for determining whether the plaintiff had shown a public interest in disclosure; 2) its refusal to take into account the unanimous conclusion of the five previous investigations, including that by Independent Counsel Starr, all of which found that Mr. Foster committed suicide, and the extensive public disclosures that accompanied those investigations;

and 3) its failure to find a nexus between the photographs released and the asserted public interest.

1. The D.C. Circuit was correct, in a situation where government malfeasance is asserted, in requiring "compelling" evidence that the photographs would show official wrongdoing before concluding that disclosure of the photographs would be "warranted." *Accuracy in Media*, 194 F.3d at 124; *see also SafeCard Serv., Inc. v. SEC*, 926 F.2d 1197, 1205-6 (D.C. Cir. 1991). This requirement is consistent with the language and the purpose of the statute. Before its amendment in 1986, Exemption 7(C) accorded protection from public disclosure only if it "would constitute" an unwarranted invasion of personal privacy.[7] Exemption 7(C) was amended in 1986 to provide protection if public disclosure "could reasonably be expected" to constitute an unwarranted invasion of personal privacy.[8] Absent compelling evidence that the photographs may be expected to contradict the conclusion of the Starr Report and the four previous investigations that Mr. Foster committed suicide, it "could reasonably be expected" that the photographs will be consistent with that determination and thus their public disclosure would be an "unwarranted" invasion of the Foster family's privacy. Only compelling, or at the very least persuasive, evidence would be sufficient to dispel the "reasonable expectation" that the invasion of privacy resulting from public disclosure of these photographs would be "unwarranted."

Even before the 1986 amendment, Exemption 7(C) contained language requiring a higher level of protection than the Ninth Circuit afforded. As this Court has observed, Exemption 6 protects personnel and medical files where

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[7] Pub. L. 93-502, § 2, 88 Stat. 1563.

[8] Pub. L. 99-570, §§ 1801, 1802, 100 Stat. 3207-48, 3207-49.

disclosure would constitute a "clearly unwarranted" invasion of privacy, while "the adverb 'clearly' is omitted from Exemption 7(C)." *Reporters Committee*, 489 U.S. at 756. "This omission is the product of a 1974 amendment adopted in response to concerns expressed by the President." *Id.*[9] By allowing the agency to withhold disclosure by showing that disclosure was "unwarranted" – not "clearly unwarranted" – Congress eased the agency's burden in seeking to protect law enforcement information implicating privacy concerns and made it correspondingly more difficult for FOIA requesters to obtain such information. The Ninth Circuit's test is inconsistent with the 1974 amendment, because it allows a FOIA requester to overcome privacy concerns by making allegations the court is required to accept, regardless whether they carry any persuasive weight. Nothing could be further from the congressional intent to lessen the agency's burden in protecting privacy, not the requester's burden in seeking to override privacy.

While other FOIA Exemptions are to be construed narrowly to favor the Act's overall policy of disclosure, Exemption 7(C) is "notable" in that it requires a balance that "is not similarly 'tilted emphatically in favor of disclosure.'" *Senate of Puerto Rico v. United States Dep't of Justice*, 823 F.2d 574, 587 (D.C. Cir. 1987) (R. Ginsburg, J.) (quoting *Bast v. United States Dep't of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981)). Both the 1974 amendment eliminating the "clearly unwarranted" requirement, and the 1986 amendment adding the "reasonable expectation" test represented a "considered congressional effort 'to ease considerably a

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[9] The President told Congress that he was "concerned that an individual's right to privacy would not be appropriately protected by requiring the disclosure of information contained in an investigatory file about him unless the invasion of individual privacy is *clearly unwarranted*." 120 Cong. Rec. 34163 (Oct. 7, 1974) (emphasis in original).

Federal law enforcement agency's burden in invoking [Exemption 7(C)].'" *Reporters Committee*, 489 U.S. at 756 n.9 (quoting 132 Cong. Rec. 31425 (October 15, 1986) (statement of Sen. Hatch)). Congress' intent to provide significant privacy protection would be undermined unless FOIA requesters are required to make a significant showing of public interest before obtaining access to law enforcement records implicating privacy rights.

Inconsistencies such as Favish cites in the evidence concerning Foster's death are a common occurrence in complex investigations. As the D.C. Circuit correctly pointed out, "[w]hen multiple agencies and personnel converge on a complex scene and offer their hurried assessments of details, some variation among all the reports is hardly so shocking as to suggest illegality or deliberate government falsification." *Accuracy in Media,* 194 F.3d 120, 124 (D.C. Cir. 1999). If Favish's preliminary showing were sufficient to require public disclosure of private material in the hands of law enforcement agencies, Exemption 7(C)'s protection would be greatly weakened. "[S]uch a facile doffing of the cloak of confidentiality" would not be consistent with the congressional purpose. *Irons v. FBI*, 811 F.2d 681, 687 (1st Cir. 1987).

The D.C. Circuit's requirement of compelling, or at least persuasive, evidence of wrongdoing is also consistent with the position taken by other circuits, which have insisted that FOIA requesters must go beyond mere allegations to overcome the statute's protection of personal privacy. *Neely v. FBI*, 208 F.3d 461, 464 (4th Cir. 2000) (public interest in law enforcement records naming individual FBI agents, suspects and other persons interviewed is "negligible," "there being no compelling allegation of agency corruption or illegality"); *Miller v. Bell*, 661 F.2d 623, 630 (7th Cir. 1981), *cert. denied*, 456 U.S. 960 (1982) ("broad

unsupported hints of a government coverup" are insufficient to overcome privacy interests implicated by law enforcement records); *KTVY-TV v. United States*, 919 F.2d 1465, 1470 (10th Cir. 1990) ("broad unsupported statement of possible neglect" in investigation insufficient to overcome privacy concerns in investigative records).

The Ninth Circuit concluded that Favish's request was sufficient because he "tender[ed] evidence and argument which, *if believed*, would justify his doubts [concerning the various investigations of Foster's death]." 217 F.3d at 1173, Pet. App. 11a (emphasis added). The Ninth Circuit concluded that it was not the function of the court "to weigh such evidence or adjudicate such arguments." *Id.* In essence, the Ninth Circuit applied the standard used to determine whether a litigant has adduced sufficient evidence to survive a motion for summary judgment.[10] But the consequence of a denial of a motion for summary judgment is that a case must proceed to trial. Here, the consequence of holding that Favish has made a sufficient showing to obtain the photographs is their production. We know of no support in any area of the law for the proposition that a litigant seeking to overcome the other party's *substantive* rights need only make a showing that, "if believed," would entitle him or her to relief. Such a minimal standard is particularly unjustified in a FOIA privacy case, because it essentially undermines the congressional intent that Exemption 7(C) provide significant privacy protection.

2. The need for a high threshold for a FOIA requester's showing of public interest is especially

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[10] The case cited by the Ninth Circuit to support its test addressed the issue of the standard to be applied as to motions for summary judgment. 217 F.3d at 1173, Pet. App. 11a (citing *Washington Post Co. v. United States Dep't of Health and Human Serv.*, 865 F.2d 320, 325 (D.C. Cir. 1989).

compelling in the present context, where there already have been five investigations of Mr. Foster's death – by the Park Police; the first Independent Counsel (Robert B. Fiske, Jr.); the ranking Republican Member of the House Committee on Government Operations; the Senate Committee on Banking, Housing, and Urban Affairs; and the second Independent Counsel (Kenneth W. Starr).[11] All these investigations came to the same conclusion – that Mr. Foster died by his own hand.

The thoroughness and seriousness of these investigations is illustrated by the report of the investigation of the second Independent Counsel (the Starr Report). JA97-211. This investigation took testimony from 31 witnesses, 19 of whom observed Mr. Foster's body (including 9 Park Police and 8 Fairfax County Fire and Rescue Department personnel). JA 120. The Starr Report describes the testimony of these witnesses at length, including testimony "not[ing] a wound out the back of [Foster's] head, and blood on the ground underneath his head and back. [The

[11] The first four investigations are described at JA 104-08. The Starr Report is printed at pp. 97-211 of the Joint Appendix. The Fiske Report was also published (*Report of the Indep. Counsel Robert B. Fiske, Jr., In re Vincent W. Foster, Jr.* (June 30, 1994)), as were the two Congressional Reports. *Final Report of the Special Committee to Investigate Whitewater Development Corp. and Related Matters on the Investigation of Whitewater Development Corp. and Related Matters*, S. Rep. No. 104-280 (1996); *Report of the Committee on Banking, Housing, and Urban Affairs Unisted States Senate on the Inquiry into the U.S. Park Police Investigation of the Death of White House Deputy Counsel Vincent W. Foster, Jr.*, S. Rep. No. 103-433 (1996). Together, the investigative bodies have released over one hundred photographs and hundreds of pages of supporting materials. Mr. Favish has drawn heavily on this material in attempting to make his case. *See* Plaintiff's Motion for Summary Judgment Excerpts of Record Vol. 1, pp. 1-41 nn.2-5, 43, 46-57, 63-76, 78-107, 113-119, 122-129, 133-155, 159, 160, 164, *Favish v. Office of Indep. Counsel* (9th Cir. 2001) (No. 01-55487).

witnesses] observed no signs of a struggle." JA 125-26 (citations omitted).

The Starr Report contains an extensive description of the autopsy, conducted by Dr. James Beyer, the Deputy Chief Medical Examiner of the Virginia Office of the Chief Medical Examiner. JA 128. Dr. Beyer (who had performed over 20,000 autopsies) concluded that Foster died of a self-inflicted wound. JA 134. The Starr Report describes the basis for this finding in painstaking detail, including the location of the wound, the presence of "gunpowder debris" on Mr. Foster's hand and in his mouth, and the absence of any other wound to indicate that there had been a struggle. JA 129-34. The Starr Report states that two sets of independently retained experts reviewed Dr. Beyer's conclusion and agreed with it. JA 134. Later laboratory analysis and test firings of the gun used, together with autopsy photographs showing powder residue on his hands, led another expert to conclude that "Mr. Foster held the weapon when it was fired." JA 141-43.[12]

The Starr Report contains an extensive analysis of the pattern of blood on the body and the ground, concluding that it was inconsistent with any theory that the fatal shot had been fired elsewhere and the body moved to the scene. JA 146-49, 165-68. The Starr Report also describes extensively the conclusion of a pathologist that Mr. Foster committed suicide, JA 159-65, a conclusion with which a separate panel of pathologists agreed. JA 162-63 nn. 187, 189, 190. In addition, the Starr Report discusses other evidence, including evidence that the gun used belonged to Mr. Foster (JA 152-54, 179-84), and evidence that "Mr. Foster was, in fact,

[12] This conclusion was reached by Dr. Henry C. Lee, an expert in physical evidence and crime scene reconstruction and Director of the Connecticut State Police Forensic Science Laboratory. JA 102, 143-44.

distressed or depressed in a manner consistent with suicide." JA 202-08.

The Ninth Circuit brushed aside the argument that Favish faced a high burden in seeking photographs to challenge the conclusion reached by the Starr Report and four previous investigations, commenting that "[n]othing in the statutory command shields an agency from disclosing its records because other agencies have engaged in similar investigations." 217 F.3d at 1173, Pet. App. 11a. But the statute requires public disclosure of privacy-invading material to be "warranted." In determining whether public disclosure of the photographs is "warranted," it is surely relevant that other investigations came to the same conclusion that the person seeking public disclosure seeks to challenge. Given the thoroughness of the Starr investigation and the numerous previous investigations that reached the same determination, the "reasonable expectation" – indeed, the overwhelming presumption – is that *no* public benefit will be gained by public disclosure of the photographs, and that disclosure thus will not be "warranted."

Favish has made no showing, and certainly not a compelling or even persuasive showing, that public disclosure of the photographs would warrant an invasion of the Foster family's privacy. The family's right to privacy should not be sacrificed on the basis of the minimal showing that satisfied the Ninth Circuit. And surely such legitimate privacy interests should not be made to yield to some macabre voyeurism masquerading as public interest.

Both this Court and the courts of appeals have recognized that previous public disclosures are an important element in the balancing judgment the FOIA requires for cases involving personal privacy. In *United States Dep't of State v. Ray*, 502 U.S. 164 (1991), this Court upheld the

withholding of the names of Haitian refugees interviewed by the State Department, where disclosure would invade privacy and the "public interest has been adequately served by disclosure of the redacted interview summaries." 502 U.S. at 178. The Seventh Circuit sustained the withholding of FBI agent names from disclosure on privacy grounds, where "[t]he documents [already released] reveal the entire course of the investigation and the facts it uncovered. This information should be sufficient to permit the plaintiff to evaluate the thoroughness of the investigation." *Miller*, 661 F.2d 623, 630-31. *See also Bast*, 665 F.2d 1251, 1255 (public interest "[has] been served to a large extent by the substantial release of information already made in this case"); *Halloran v. United States Veterans Admin.*, 874 F.2d 315, 324 & n.13 (5th Cir. 1989) (public interest "has already been substantially served by the release of the redacted transcripts and the VA's report on the investigation"). The Ninth Circuit's casual dismissal of prior investigations and prior disclosures was in error.

3. The Ninth Circuit's error was compounded by its failure to find any nexus between the specific photographs at issue and the public interest asserted to justify their release. As the D.C. Circuit has noted, where there already has been significant public disclosure, "it is the incremental advantage to the public of releasing [the information sought] which must be weighed against the invasion of personal privacy." *Bast*, 665 F.2d at 1255. Favish needs to show that the "incremental advantage" of public release of these photographs outweighs the invasion of the Foster family's privacy. On this score, Favish's already weak case is further weakened by his inability to demonstrate any nexus between the photographs and the public interest he asserts. It is not sufficient for him to raise general doubts about the investigation (although he has not even done that); he must make a showing of public interest "with respect to the

specific information being withheld." *Senate of Puerto Rico*, 823 F.2d at 588. But Favish has not demonstrated, with respect to any of the photographs, that "any benefit would accrue to the public from the disclosure of this document." *Kimberlin v. United States Dep't of Treasury*, 774 F.2d 204, 208 (7th Cir. 1985).

Favish's principal claim is that there are inconsistencies with respect to the location of the exit wound. However, the Ninth Circuit ordered release only of those photographs that were not "graphic, explicit and extremely disturbing." 217 F.3d at 1174, Pet. App. 13a-14a. As the D.C. Circuit observed, it is difficult to understand how any photograph not "disturbingly graphic" "could . . . elucidate the true nature of Mr. Foster's wounds." *Accuracy in Media*, 194 F.3d at 125. Because the photographs are not explicit enough to show the exact nature of Mr. Foster's wounds, which is Favish's goal, there is no public interest in their release. "In the absence of any public interest in disclosure, any countervailing interest in privacy defeats a FOIA request." *Oguaju v. United States*, 288 F.3d 448, 451 (D.C. Cir. 2002), *petition for cert. filed* (U.S. Aug. 2, 2002) (No. 02-5651). "[S]omething, even a modest privacy interest, outweighs nothing everytime." *Nat'l Ass'n of Retired Fed. Emp. v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989.) The Ninth Circuit's action, which furthers no ascertainable public interest, is at its core incomprehensible.

B. A Surviving Family Has A Significant Privacy Interest In Photographs Of A Family Member's Body.

The court of appeals agreed that surviving family members have a privacy interest in photographs of their loved one's dead body, stating:

> What the cases point to is a zone of privacy in which a spouse, a parent, a child, a brother or a sister preserves the memory of the deceased loved one. To violate that memory is to invade the personality of the survivor. The intrusion of the media would constitute invasion of an aspect of human personality essential to being human, the survivor's memory of the beloved dead.
>
> We hold as a matter of law that the personal privacy in the statutory exemption extends to the memory of the deceased held by those tied closely to the deceased by blood or love and therefore that the expectable invasion of their privacy caused by the release of records made for law enforcement must be balanced against the public purpose to be served by disclosure.

217 F.3d at 1134, Pet. App. 13a.

The court, however, refused to enforce the survivor's privacy right as to those photographs it did not find to be "graphic, explicit, and extremely upsetting."[13] The court of appeals was right as to the existence of a privacy interest, but wrong in concluding that disclosure of photographs it apparently did not deem "graphic, explicit, and extremely upsetting" did not constitute an unwarranted invasion of personal privacy.

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[13] As observed, the district court erroneously held that a privacy interest was not implicated by photographs that were not "graphic, explicit, and extremely upsetting." Pet. App. 44a-46a. The Ninth Circuit's cryptic summary affirmance apparently embodies its conclusion that the Foster family had no privacy interest in photographs not meeting that description.

1. The case law under FOIA is unanimous that surviving families have a right of privacy in photographs of a family member's body, and on that basis the courts have rejected public disclosure of such photographs under the FOIA. *Accuracy in Media*, 194 F.3d at 122-23 (death scene and autopsy photographs of Vincent Foster); *Hale v. United States Dep't of Justice*, 973 F.2d 894, 902 (10th Cir. 1992), *vacated on other grounds*, 509 U.S. 918 (1993) (photographs of murder victim); *Katz*, 862 F.Supp. 476 (autopsy photographs of President Kennedy). Other cases have refused to order public disclosure of autopsy reports, because of the surviving family members' privacy rights. *Bowen v. United States Food & Drug Admin.*, 925 F.2d 1225, 1228-29 (9th Cir. 1991); *Badhwar v. United States Dep't of the Air Force*, 829 F.2d 182, 186 (D.C. Cir. 1987) (autopsy reports that "would shock the sensibilities of surviving kin" protected by Exemption 6); *Marzen v. United States Dep't of Health and Human Serv.*, 825 F.2d 1148, 1154 (7th Cir. 1987) (medical records of deceased infant protected by Exemptions 6 and 7(C)). *Cf. Campus Communications v. Earnhardt*, 821 So.2d 388, 401 (Fla. App. 2002) (denying release of autopsy photographs of race car driver killed in racing accident).

A particularly important precedent is the D.C. Circuit's decision refusing to order disclosure of reports on the FBI's surveillance of Dr. Martin Luther King, Jr., on the ground that disclosure would invade the privacy rights of Dr. King's family and associates. *Lesar v. United States Dep't of Justice*, 636 F.2d 472, 488 (D.C. Cir. 1980). That case was decided six years before the 1986 legislation that significantly amended Exemption 7(C), but left in place the Exemption's stricture against an "unwarranted invasion of personal privacy." Pub. L. 99-570, §§ 1801, 1802, 100 Stat. 3207-48, 3207-49. Given its subject matter, the case must

have been known to Congress. When Congress amends a statute without repealing a prominent precedent, there is a "presumption that Congress intended to embody [the precedent] in the amended version." *Lindahl v. Office of Pers. Mgmt.*, 470 U.S 768, 782 (1985).

These cases are consistent with the Attorney General's interpretation of Exemption 6 as originally passed in 1966 P.L. 89-487, 80 Stat. 250. The Attorney General concluded that the provision's protection of "personal privacy" was intended to cover "the privacy of any person, including members of the family of the person to whom the information pertains." *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 31 (June 1967) (http://www.usdoj.gov/04foia/67agmemo.htm). The Act's reference to "personal privacy" was not intended to preclude claims by surviving family members; rather, this language established that "[t]he right of privacy envisioned in the Act is personal and cannot be claimed by a corporation or association." *Washington Research Project v. United States Dep't of Health, Educ. and Welfare*, 366 F.Supp. 929, 937-38 (D.D.C. 1973) (Gesell, J.), *rev'd in part on other grounds*, 504 F.2d 238 (D.C. Cir. 1974), followed in *Sims v. CIA*, 642 F.2d 562, 572 n.47 (D.C. Cir. 1980), *rev'd in part on other grounds*, 471 U.S. 159 (1985); *Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 685 n.44 (D.C. Cir. 1976).

Also instructive is the *Restatement of Torts*, which establishes that right of privacy protects intimate family matters from "highly offensive" publicity. *Restatement (Second) of Torts* § 652D and cmt. b at 386. (1977).[14]

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[14] The *Restatement* addresses the scope of the tort action for violation of privacy. This Court has stated that "[t]he question of the statutory meaning of privacy under the FOIA is, of course, not the same as the question whether a tort action might lie for invasion of privacy. . .

Public display of photographs of the dead body of a family member is a matter concerning the family life of the survivors, which normally would be "highly offensive" to any reasonable person. A death in the family is, of course, a supremely important family event. The moments surrounding death are typically reserved for close family, wherever possible. Even after death, both law and long-standing tradition recognize that the family has a right to the body in order to give it a private burial or other leave-taking consonant with the family's beliefs and traditions.[15] Any conduct that puts the body on public display without the family's consent[16] has been regarded as highly offensive since the origins of our civilization.[17]

Publication of photographs of a body is the modern-day equivalent of putting the body itself on public display. The reaction of Foster's widow to the leaked photograph – her "shock of seeing the picture of Vince on the television with the gun in his hand" (Amended Decl. of Lisa Foster Moody, JA 95) – was not an aberration. Virtually any family in the same situation would understand why the Foster family "cannot bear seeing him lying on the ground in Fort Marcy Park with blood stains on him, coupled with the indignity of the whole world's viewing these pictures in tabloids or on the Internet." *Id.* The Foster family's desire to protect Mr. Foster's elderly mother from seeing that kind of photograph on television or on the tabloids at the supermarket checkout counter (Amended Decl. of Sheila Foster Anthony, JA 91-92) is totally understandable. "One has only to think of Lindbergh's rage at the photographer who pried open the coffin of his kidnapped son to photograph the remains and peddle the resulting photos." *Accuracy in Media,* 194 F.3d at 123.[18] The right of privacy should protect the Foster family from the "additional torment which would result from the release of these graphic

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." *Reporters Committee*, 489 U.S. at 762 n.13. Nevertheless, the common law meaning of privacy helps to illuminate the statutory meaning, as this Court also recognized in *Reporters Committee*. 489 U.S. at 763 n.15 (discussing common law and citing Section 652D of the *Restatement*). See also *Marzen*, 825 F.2d at 1152; "Although the common law doctrine of privacy may assist analysis, the privacy exemption under FOIA is not designed to prevent what would be tortious at common law. Congress intended that the privacy interest protected under FOIA extend beyond the common law."

15 The family's right to bury its dead is "sacred to the individual." *Koerber v. Patek*, 102 N.W. 40, 43 (Wis. 1905). "[I]n order to respect 'those sentiments connected with decently disposing of the remains of the departed which furnish one ground of difference between men and brutes,' . . . this Court has consistently found that a decedent's next of kin has a personal, quasi-property right in his or her corpse to ensure its proper handling and burial." *Bauer v. North Fulton Med. Ctr., Inc.*, 527 S.E.2d 240, 243 (Ga. App. 1999) (quoting *Louisville & N.R.. Co. v. Wilson*, 51 S.E. 24 (Ga. 1905)). *See also Whitehair v. Highland Memory Gardens, Inc.*, 327 S.E.2d 438, 441 (W.Va. 1985) (Survivors have a right "to have the body treated with decent respect, without outrage or indignity"). "Irrespective of one's religious views, and even if one is an atheist or an agnostic, it is almost universally understood that the bodies of the dead are to be treated with the utmost respect and in a manner that will not inflict any more emotional pain upon 'the wounded hearts of friends and mourners.'" *State v. Condon*, 789 N.E.2d 696, 706 (Ohio App. 2003) (quoting *Commonwealth v. Browne*, 74 Pa. D. & C. 2d 724, 730 (Pa. Com. Pl. 1976)).

16 Mr. Foster's casket remained closed throughout the funeral. Amended Declaration of Lisa Foster Moody, JA 95.

17 In the *Iliad*, after Achilles kills Hector in battle, he drags his body in the dirt and leaves it on public display. He is then told that "the gods frown" on his conduct and that Zeus is "angered," and so he returns Hector's body to his father for funeral rites according to the customs of Troy. Homer, *Iliad* Book 24 (translation by Richmond Lattimore).

18 The incident is described in Dorothy Herrmann's *Anne Morrow Lindbergh, A Gift for Life*, 110 (1992), and in James C. Giblin's *Charles A. Lindbergh, A Human Hero*, 132 (1997).

photographs."[19] Amended Decl. of Sheila Foster Anthony, JA 92.

2. The Ninth Circuit summarily affirmed the district court's order to disclose photographs of Foster's body that the district court did not consider to be "graphic, explicit, and extremely upsetting." Pet. App. 44a-46a. It is difficult to know exactly what the Ninth Circuit meant by this truncated ruling, although it appears to confirm the district court's view that photographs not meeting that description do not implicate a privacy interest.

Such a standard, however, exhibits an overly narrow conception of the surviving family's privacy right. The intrusion on the family's privacy arises from the public display of images of the loved one's dead body; it does not depend on whether the body is blood-covered. Photographs of the body that do not show blood may be less offensive to disinterested third parties. But it is the privacy of the Foster family – not disinterested observers – that is at stake. Any public display of photographs of Foster's body, blood-stained or not, would be a highly offensive intrusion into the family's privacy.

The Ninth Circuit did not consider the leaked photograph of Foster's dead hand to be "graphic, explicit, and highly disturbing." Pet. App. 13a-14a. Nevertheless, regardless of how a disinterested observer may have reacted, the "family was horrified and devastated by the photograph leaked to the press and published on a national television network and in newspapers of Vince's dear dead hand

[19] The family has assiduously protected its privacy and turned down all requests for TV appearances and other interviews, with the exception of one dignified, restrained interview in homage to Mr. Foster that his widow gave to the New Yorker magazine. Peter Boyer, *Life After Vince*, The New Yorker (Sep. 11, 1995) at 54.

holding the gun he used to kill himself." Amended Decl. of Sheila Foster Anthony, JA 91. The family's reaction was entirely understandable. The offense to the family stems from public display of the body, without regard to whether a photograph might be viewed by a disinterested observer as graphic, explicit, or extremely upsetting.[20]

As previously described, the lower courts have extended privacy protection to a deceased's medical records and autopsy reports, without any showing that they were "graphic, explicit and extremely disturbing." *Badhwar v. United States Dep't of the Air Force*, *supra*; *Bowen v. United States Food & Drug Admin.*, *supra*; *Marzen v. Dep't of Health and Human Serv.*, *supra*. A district court accorded privacy protection to the tapes of the last moments of the crew of the Challenger, with no indication that these tapes met the Ninth Circuit's test. *New York Times Co. v. NASA*, 782 F.Supp. 628 (D.D.C. 1991). Following 9/11, the FBI granted the same protection to the tape of the final moments in the cabin of Flight 93, allowing it to be heard only by the surviving families.[21] These cases and conduct recognize that

[20] For these reasons, the court of appeals should have withheld the photograph of Foster's dead hand, as well as the other photographs at issue. As noted, that photograph already had been leaked and widely published in the media. Nevertheless, "renewed publicity brings with it renewed invasion of privacy. The renewed intrusion is subject, in its own right, to FOIA protection." *Bast*, 665 F.2d at 1255. The fact that the body has been displayed partially once before does not make a second public display any less offensive.

Moreover, the photographs of Mr. Foster's hand holding the gun at issue here is a color original. The photograph previously leaked was a black and white copy. Disclosure of a *color* photograph would have an even more intrusive impact on family sensitivities.

[21] Susan Sward, *The Voice of the Survivors: Flight 93, Fight to Hear Tape Transformed Her Life*,, S.F. Chron., Apr. 21, 2002; Don Phillips and Dan Eggen, *Pilots Assail Plan to Play Flight 83 Voice*

surviving families have a privacy interest that is violated by public display of images and sounds of the moments surrounding the death of their loved ones, regardless whether these images and sounds might be regarded by disinterested observers as "graphic, explicit, and extremely disturbing."

CONCLUSION

The judgment of the court of appeals, to the extent that it requires the release of four photographs of Mr. Foster's body, should be reversed, with directions to dismiss the complaint.

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Recording; Precedent Feared in FBI Decision to Let Victims' Families Listen, The Wash. Post, Apr. 16, 2002, at A03.